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THE THEORY OF THE CASE.

Many persons have an idea that there is and was intended to be a great difference between code pleading and common law pleading. There never was a greater mistake. The only difference intended was one of form and of unification, simplification and expedition. The forms have been done away with, but the rules of pleading remain. The experience of two civilizations is the foundation upon which is built the code pleading to-day. If the code has brought with it one disturbing element more than all others, it is what has been grafted upon it by construction, and is called "the theory of the case." Some courts have given this "graft" a place in direct opposition to the express language of the code itself, which peremptorily calls for the complaint or petition, the answer and reply. The code shows also what the statement of the case shall contain, namely, the facts constituting the cause of action, in ordinary and concise language, without unnecessary repetition. Nor is the command that follows any less explicit as to what follows. The code reaffirms old and fundamental law, and against which there cannot be a dispensation without introducing a jurisprudence at variance with a limited and defined government.

A court is bound by its record, and to bind it there must be a record. The statutory record (bill of exceptions) is not the record that binds the court before the trial, at the trial or after it. This record is nothing without an assignment of errors in an appellate court; it is surplusage except as error is assigned upon it. A consideration of these facts will show upon what footing the theory of the case must rest. When courts hold that the "theory of the case" controls, and even dispenses with pleadings, it is time the bar should be calling such courts to an accounting. The establishment of such a heresy is to cut loose from our moorings and put to sea without a rudder or compass. This vagary has been carried to such an extent as to hold that if one sets out a copy of the

instrument sued upon that this is demurrable; that instead he must plead the theory of the case. Says an author of prominence: "Distinguished, widely cited and prominent authors have written that pleadings are but tice, and like any other notice they may be waived; that this is the view of modern and enlightened courts."

Says the Supreme Court of the United States in the case of *Devine v. Los Angeles*, 202 U. S. 334: "The rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of his cause of action, leaving the defendant to set up in his answer what his defense is. * * * The cases hold that to give the circuit court jurisdiction the federal question must appear necessarily in the statement of the plaintiff's cause of action, and not mere allegations of the defense which the defendants intend to set up or which they rely upon." *Third Street Ry. Co. v. Lewis*, 103 U. S. 457. In this case the Supreme Court of the United States repudiates the practice of which we complain, which has taken root in California. The fact is that most of our law books to-day are showing us the leaves and branches they have cut from trees and shrubbery here and there, and judges have been deciding cases from such a showing. They know nothing of the nature and growth of the tree as a symmetrical whole. They must understand the whole process. We have got to know, if we would know a tree, that the crude sap passes from the roots, up through the sap wood into the leaves, and is there changed into constructive material which is used in constructing the tree; that the new layer of wood is put on the tree by a downward process of the sap, and the growth of the roots is thus extended. When we know the whole process, the branches, leaves, flowers and fruit of the tree have a significance entirely different from that which was impressed upon us without this knowledge.

It is because the Supreme Court of the United States, Massachusetts, Wisconsin and most of the southern states have kept in view the history of the law, the growth of it, and have seen the gradual processes of its growth, that these observations were made in the early growth of the law in those jurisdictions, when the judges had time to get full views, that up to date they have never allowed

any such heresy to creep into the procedure of their courts as that the pleadings may be waived and the jury instructed upon the "theory of the case as made by the evidence." It is the duty of the court to confine the evidence to the case as made by the pleadings, because the record proper is the only record of the case upon which an appeal may be based until objections have been made and exceptions taken. If there is a material variation of the evidence from the pleadings, the pleadings must be corrected so as to cover the variations, and if the variations are so material as to be a matter of surprise to the opposite party, the case should be continued, so that the opposite party can have an opportunity to meet the matter of the change. This erroneous view is maintained in Thompson on Trials, Vol. 2, Secs. 2310-2311, and has been taken as gospel and spread wide, but is not only bad logic but is as shown, expressly repudiated by the Supreme Court of the United States in Devine v. Los Angeles, *supra*. We expect to call attention to these sports which grow out of the body of the law to its discredit, and help our subscribers in keeping the deep channels from being filled up with "canned" sediment of case opinion. Our views find support in a most able opinion by Mr. Justice Sherwood, in Malinekrodt, etc. v. Nemnich, 169 Mo. 388; Story's Equity Pleading, Sec. 10; United States v. Cruikshank, 92 U. S. 542; Rushton v. Aspinwall, 2 Doug. 679. This principle also was a part of the Roman procedure, as shown by the maxim *de non apparentibus et non existentibus eadem est ratio* (what is not juridically presented cannot be judicially considered).

NOTES OF IMPORTANT DECISIONS.

SPECIFIC PERFORMANCE—ACTS DONE PRIOR TO A VERBAL CONTRACT TO CONVEY LAND ARE NEVER A PART PERFORMANCE UPON WHICH TO BASE SPECIFIC PERFORMANCE OF AN AGREEMENT.—Some interesting points are presented in the case of Price v. Lloyd (Utah), 86 Pac. Rep. 767, in a suit for specific performance against the executor of a will. It appears from the allegations in the complaint that the plaintiff was a niece of the deceased; that she had married his son; that for the last 21 years of his life the deceased was unmarried; that prior to July, 1891, the plaintiff did acts of kindness for the deceased,

and that in consideration thereof, and in consideration of future obligations on the part of plaintiff, "to-wit, that she would continue to attend to his wants and assist him," the deceased, in July, 1891, "said to her that he would give her the lot which she now occupies (fully described); that the said terms of the contract were accepted by her and her father-in-law as a promise to convey for the services she had done and for the services that she was to do, and the said deceased said to her: 'Move in, take possession, and repair and fix it up. It is yours. I want to retain the title until I die, but it shall be yours from this on,'—thus making a contract the consideration of which was that the plaintiff should protect and look after said deceased, and that he should provide her with that home and property, and deed it to her or will it to her." It was further alleged that plaintiff had washed and mended clothes for the deceased, and had made bread and cooked for him, and that she had fully complied with the contract on her part; that she and her husband had moved upon said premises and had expended \$2,000 thereon in improving the same, and that the plaintiff had furnished the deceased money with which to pay the taxes each year; that when the will of the deceased was produced it did not provide that the property belonged to the plaintiff; and that she had no paper title, but that she was in possession and had been in possession since July, 1891, and has held the property adversely to the said William J. Lloyd and to his heirs. After finding that the parties were related to each other as in the complaint alleged, the court found: "That the plaintiff had cared for the deceased in sickness and in health; that on July 2, 1891, the deceased, William J. Lloyd, gave to the plaintiff by verbal gift the premises involved in this suit; that no writing was made therefor, but plaintiff entered upon the possession and she and her husband, Fred W. Price, expended money thereon as owners of said property and not as tenants; that said possession was taken in pursuance of said promise, and would not have been taken except for said promise that the property should belong to said plaintiff; that the expenditures of money on said premises were made in reliance upon such promise and gift; that verbally the deceased, William J. Lloyd, gave the property described in the complaint to the plaintiff in this case; that she performed all acts and duties and requests made upon her, she was a daughter to him both before and after the gift as long as he lived; she worked for him, washed for him, and did all those things for him which a daughter can do; that she paid taxes on said property to the said deceased." From these facts the court made the following conclusions of law: "That the donation by verbal gift ratified by possession entitles the plaintiff to a decree for the property; that plaintiff having acquired no title, right or interest in and to the premises in controversy by virtue of the statute of limitations or adverse possession, and the decree of owner

ship in this action is based solely on the oral gift of said premises as set forth in these findings." The court said in part: "While there is evidence showing that some of the tenants, on different occasions, paid rent to the plaintiff, yet the undisputed evidence shows that other tenants paid rent to the deceased. This circumstance tends to show a concurrent rather than an exclusive possession on her part. The plaintiff, however, has wholly failed to show any consideration for a parol gift of the land, and without a valuable consideration possession alone is not sufficient to take the case without the statute."

Pomeroy, § 130, in his work on Specific Performance of Contracts, says: "Possession alone is not sufficient. A parol gift of land, even from father to son, will not be enforced unless followed by possession and by valuable improvements made by donee, or unless there are some other special facts which would render the failure to complete the donation peculiarly inequitable and unjust. This rule, however, has no connection with the statute of frauds. In order to grant its remedy of specific execution, equity requires a valuable consideration. It never enforces a voluntary agreement. The statute of frauds is satisfied with possession as part performance, and the general doctrines of equity demand in addition thereto a valuable consideration. This latter demand is satisfied by the outlays, expenditures and labors of the donee in making the valuable improvements as a consequence of the gift." 4 Pom. Eq. Jur. (3d Ed.), Sec. 1409; *Harrison v. Harrison*, 36 W. Va. 556, 15 S. E. Rep. 87; *Wooldridge v. Hancock*, 70 Tex. 18, 6 S. W. Rep. 818; *Lightner v. Lightner* (Va.), 23 S. E. Rep. 301; *Roberts v. Mulliner*, 94 Ga. 493, 20 S. E. Rep. 350. Upon a careful consideration of the whole case, we think the evidence is insufficient to justify a decree granting the legal title of the premises to plaintiff. Of this case it may well be said, as it was said by the court of *Zallmanzig v. Zallmanzig* (Tex. Civ. App.), 24 S. W. Rep. 944: "All the facts in the case are consistent with the assumption that there was merely a desire upon the part of the father to provide a home for his children, and that, without giving them any title to the land he gave them permission to live on the land." The court further said: "In order to ingraft this exception onto the statute of frauds, which requires that a conveyance of lands must be evidenced by a memorandum in writing there should in addition to the fact of possession and making of improvements, be clear and conclusive proof of the contract, its scope and terms. The object of the statute of frauds is to prevent the transfer of titles to lands 'on loose and indeterminate proofs of what ought to be established by solemn written contracts.' *Taylor v. Ashley*, 15 Tex. 50. In order to sustain a verbal contract for the sale of land, of course, it is absolutely necessary to prove the verbal con-

tract either by direct or circumstantial evidence; and this must be accompanied by proof of possession and strong equities independent of the contract. And in *Buhler v. Trombly* (Mich.), 102 N. W. Rep. 647: Here we do not find any agreement—any contract—to have been made. Considered in the light of complainant's own testimony, there was an act of bounty, merely, on the part of the father, which complainant naturally, and to his profit, was willing to accept; and, as has been already stated, it does not appear that he agreed to do anything, or ever did or refrained from doing anything, ever, in any way, changed his condition or circumstances, was induced to forego any benefit or assume any liability, because of or relying upon the promise of the father. Though it were conceded that all the allegations of the complaint with respect to the promise or contract had been established by sufficient evidence, the necessary and most essential allegation, that the plaintiff, by reason of the gift or promise, and in reliance on its execution, did or refrained from doing anything, or was induced thereby to change her condition or circumstances, or to forego any benefit, or to assume any liability, or that her status or relation had been so far altered that not to enforce a performance of the promise or gift perpetrates a fraud upon or inflicts an unjust and unconscionable injury and loss to her, is not established by sufficient evidence. She has shown no such strong equities as are required by the authorities, and which are required to be shown independent of the parol gift or verbal contract.

Courts of equity, in establishing the doctrine invoked by plaintiff, have not by any means intended to annul the statute of frauds, but only to prevent its being made the means of perpetrating a fraud. In order that a plaintiff may be permitted to give evidence of a contract not in writing, and which is in the very teeth of the statute and a nullity at law, it is essential that he establish, by clear and positive proof, acts and things done in pursuance and on account thereof, exclusively referable thereto, and which take it out of the operation of the statute. Pomeroy, §§ 107, 108. The law, under the statute of frauds, excluding all evidence of such a contract, to justify a court of equity in going against the plain words of the statute, a plaintiff is required to present strong equities for so doing, and a showing that a fraud will be perpetrated upon him if the statute is permitted to be interposed. Such a presentation and showing the plaintiff has failed to make."

ARGUMENTS OF COUNSEL.

Prior to the year 1870 there were probably less than twenty reported cases in which courts of last resort had been called upon to decide whether in addressing the jury, counsel had overstepped the proper limits by commenting upon matters of fact which were not in evidence and calculated to affect the verdict to the prejudice of the opposing party. There are now hundreds of decisions and they are assuming a rapid growth from year to year. The legal profession has discovered that the courts are not loath to grant new trials for transgressions of this nature, where there is a probability that the verdict has been affected thereby. Imbued with the zeal aroused by the advocacy of their client's cause, counsel of ability and well known integrity are sometimes carried beyond the boundary of legal propriety in the use of harmful expressions not justified by the record. The courts have been more inclined to make such misconduct the ground for granting new trials, where it has been committed by counsel of ability and standing, proceeding upon the obvious ground that the jury would be less likely to be influenced by evidentiary or prejudicial matters thus improperly stated by counsel of indifferent standing and reputation.¹ Although numerous authorities warn him that he will jeopardize the people's interest by stating and commenting upon facts hostile to the defendant which have not been introduced in evidence, a prosecuting officer will often refer to the unsavory past record of the prisoner which otherwise could not in any legitimate manner be brought to the knowledge of the jury. It may be generally stated where the prosecuting attorney in his argument to the jury asserts a fact not in evidence which is prejudicial to the defendant, it is error.² Where the prosecuting attorney said that "he knew personally the saloon keeper in this case and that he was guilty of this, and he was sure of other crimes," it was held error for the court upon request to

fail to instruct the jury to disregard such remark.³ So the epithet of "dirty dog," in referring to the defendant in the prosecutor's opening address, is held a breach of professional decorum, although the court held such misconduct insufficient for a reversal.⁴ In Missouri the courts have held it reversible error to abuse the defendant, as where the prosecutor called the defendant "a mean, low-down, wicked, dirty devil,"⁵ and "a sugar loafed, squirrel-headed Dutchman."⁶ And in Texas denouncing the defendant as a "black thief" was held ground for reversal of a verdict of conviction.⁷ The statement that defendant "did not have the decency of a rattlesnake," is also improper.⁸ Where the prosecuting attorney in arguing upon the admissibility of a question to a witness, was not rebuked for stating that he intended to prove that the defendant was guilty of certain other offenses, particularizing them where such proof would be inadmissible, it was held ground for a new trial.⁹ And in Arkansas the court held that similar remarks were held to require more than a mild reproof from the trial judge.¹⁰ And so a statement that defendant's reputation is "vile" is ground for reversal where the evidence indicates the contrary.¹¹ It is held improper for the prosecuting attorney to state to the jury in argument that defendant is, as he personally knows, a noted hotel thief.¹²

Generally language used by counsel for the state in his address to the jury, which consists in a personal and extreme vilification of the accused, is sufficient of itself to warrant a reversal.¹³ But in some states a reference in argument to the fact that the accused has been guilty of other crimes, is not ground for a new trial.¹⁴ And the statement by the state's

³ Brown v. State, 103 Ind. 133.

⁴ Anderson v. State, 104 Ind. 467, 4 N. E. Rep. 63; Bassette v. State, 101 Ind. 85; Epps v. State, 102 Ind. 539.

⁵ State v. Young, 99 Mo. 666.

⁶ State v. Ulrich, 110 Mo. 350, 19 S. W. Rep. 656. See also State v. Fischer, 124 Mo. 460; State v. Bobst, 131 Mo. 328.

⁷ Crawford v. State, 15 Tex. App. 501.

⁸ Chicago U. T. Co. v. Lauth, 216 Ill. 176, 74 N. E. Rep. 738.

⁹ Leahy v. State, 31 Neb. 566.

¹⁰ Holder v. State, 58 Ark. 473.

¹¹ People v. Barker, 62 Hun, 622, 17 N. Y. Supp. 16.

¹² Heyle v. State, 109 Ind. 589, 10 N. E. Rep. 916.

¹³ Stone v. State, 22 Tex. App. 185, 2 S. W. Rep. 585; Earll v. People, 99 Ill. 123.

¹⁴ Commonwealth v. Hanlon, 8 Phila. 423; State v.

¹ Gibson v. Zeibig, 24 Mo. App. 72; Fathman v. Tumility, 34 Mo. App. 237; People v. Evans, 72 Mich. 367; Huckell v. McCoy, 38 Kan. 53.

² McDory v. State, 62 Ala. 154; People v. Mitchell, 62 Cal. 411; Brown v. State, 60 Ga. 210; Fox v. People, 95 Ill. 71; People v. Aiken, 66 Mich. 460, 33 N. W. Rep. 821, 11 Am. St. Rep. 512; Fuller v. State, 30 Tex. App. 559, 17 S. W. Rep. 1108; Killens v. State, 28 Fla. 313; State v. Lingle, 128 Mo. 528, 31 S. W. Rep. 20.

attorney that the defendant "is guilty because he is indicted in another case in this court," though objectionable, is not cause for reversal.¹⁵ Mere abuse is also improper,¹⁶ but remarks not amounting to a misstatement of a material fact, but which are rather the venting of offensive epithets, are not ordinarily a ground for reversal, although the court should correct them as an offense against its dignity.¹⁷ Counsel are allowed great liberty in characterizing the conduct of parties or witnesses, when there is evidence to support it, and the use of the following terms or epithets has not been considered reprehensible or of sufficient ground for reversal, viz: a reference to the adverse party's "colossal rascality"¹⁸ stigmatizing the defendant as a "liar, thief and forger," no evidence sustaining it;¹⁹ "murderer," in a murder trial;²⁰ that the defendant "lied from stem to stern;"²¹ and such terms as "robber," "assassin," "fiend," and the like.²² And in civil suits while it is the duty of the court to see to it that no advantage is obtained by improper remarks of counsel made to or in the presence of the jury, still counsel cannot be put into a straight jacket when making their arguments, but within reasonable bounds of propriety must be left to their own discretion.²³

Where, in his closing argument, plaintiff's counsel called defendant hard names, such as "villain," "scoundrel," "fiend," "hell-hound," etc., the court held that although harsh terms and other language might have been used equally as descriptive and not so vituperative, it was not error where the defendant's counsel did not ask the court to interpose.²⁴ As a rule it is within the discretion of the trial court to determine whether counsel transcends the limits of propriety by the use of coarse and abusive language and

the exercise of this discretion will not be reviewed by an appellate court,²⁵ except where counsel are permitted to travel outside the record or persist in disregarding the admonitions of the trial judge,²⁶ or to indulge in remarks of a material character so unwarranted as to be clearly prejudicial to the rights of the parties assailed.²⁷ But when such allusions are made and the changes rung upon them for the evident purpose of inflaming the passions and prejudices of the jurors, and leading them to disregard their sworn duty, to overlook the actual facts or set aside a clear legal right, they are improper and constitute good grounds for a new trial where the trial judge refuses to interpose or take proper measures to supercede their prejudicial effect.²⁸ Thus it is improper to state that "there is no recompense that can in any way compensate a father or parent for the loss of a child."²⁹ Asking the jury to bring such a verdict as would teach defendant and all similar corporations that they must run their roads with some regard for life and limb, constitutes reversible error when unrebuked by the court after objection.³⁰

In an Illinois case counsel for plaintiff in arguing the case to the jury said to them: "These powerful railroad corporations ignore the rights of citizens, maim or kill them at pleasure, and then bring in their employees to swear them through; that most of the witnesses for the defense were employees of the defendant and had to swear the way they did or lose their jobs, and that they ought not to be believed for that reason." The court in reversing the case said: "Counsel for de-

²⁵ *State v. Hamilton*, 55 Mo. 522; *St. L. & S. E. Ry. Co. v. Myrtle*, 51 Ind. 566.

²⁶ *Ensor v. Smith*, 57 Mo. App. 584; *State v. Williams*, 65 N. Car. 505; *Schlotter v. State*, 127 Ind. 493; *State v. Proctor (Ia.)*, 53 N. W. Rep. 424; *State v. Young*, 99 Mo. 683.

²⁷ *Holden v. Penn. R. Co.*, 169 Pa. 1, 32 Att. Rep. 103; *Marble v. Walters*, 19 Mo. App. 134; *Provost v. Brueck*, 110 Mich. 136; *Swift & Co. v. Rutkowski*, 132 Ill. 18; *Johnson v. Brown*, 130 Ind. 534.

²⁸ *Henry v. Huff*, 143 Pa. St. 563; *Williams v. Brooklyn El. R. Co.*, 128 N. Y. 96, 46 Am. & Eng. R. Cas. 149; *Himrod Coal Co. v. Beckwith*, 111 Ill. App. 379; *Wabash R. Co. v. Billings*, 212 Ill. 37, 72 N. E. Rep. 2; *Houston, etc., R. Co. v. Rehm (Tex. Civ. App.)*, 82 S. W. Rep. 526; *Waterman v. Chicago, etc., R. Co.*, 82 Wis. 613.

²⁹ *Chicago City R. Co. v. Math*, 114 Ill. App. 350; *C. & A. R. Co. v. Vipond*, 212 Ill. 199, 72 N. E. Rep. 22.

³⁰ *Kinne v. International R. Co.*, 90 N. Y. Supp. 930.

Robertson, 26 S. C. 117, 1 S. E. Rep. 443; *State v. Regan*, 8 Wash. 506, 36 Pac. Rep. 472.

¹⁵ *Spahn v. People*, 137 Ill. 538.

¹⁶ *Chicago U. T. Co. v. Lauth*, 74 N. E. Rep. 738.

¹⁷ *Franklin v. St. L., etc., R. Co. (Mo.)*, 87 S. W. Rep. 930.

¹⁸ *Hickey v. Behrens*, 75 Tex. 488.

¹⁹ *State v. Brooks*, 92 Mo. 542.

²⁰ *State v. Griffin*, 87 Mo. 612.

²¹ *Dale v. State (Ga.)*, 15 S. E. Rep. 287.

²² *Territory v. Ely*, 6 Dak. 128; *Watson v. State (Tex.)*, 22 S. W. Rep. 1088; *Snodgrass v. Commonwealth (Va.)*, 17 S. E. Rep. 238.

²³ *Goldstein v. Smiley*, 168 Ill. 438; *N. C. St. R. Co. v. Anderson*, 176 Ill. 635.

²⁴ *Ferguson v. Moore*, 98 Tenn. 342, 39 S. W. Rep. 341.

fendant interposed an objection to such a course of argument and the court sustained it and said to the jury that the remarks were improper and that they should disregard them and decide the case upon the merits and according to the law as the court should give it in the instructions. Such a statement by counsel is wholly indefensible and unless it can be seen that it did not result in injury to the defendant, the judgment ought to be reversed on account of it. The effects of such an attack may be obviated by the action of the court in some cases, while in others it may be effective in arousing passion and prejudice notwithstanding the direction of the court."³¹

Telling the jury of plaintiff's poverty and seeking to prejudice them against a defendant corporation, reference to plaintiff's poor clothing, that case at bar involved a scheme to keep plaintiff out of his labor, to inquire of jurors how much they would take for similar injuries, to contrast the poverty of plaintiff and the wealth of the defendant, to appeal to the prejudice against corporations, are all improper and ground for reversal.³² Accusations of tampering with witnesses without evidence to support them are likewise unjustifiable.³³ But a charge of bribery is not objectionable when it is a proper and legitimate inference from all the evidence in the case.³⁴ Comments on the result of former trials of the same case are regarded as improper and in some cases so harmful as to constitute grounds for a new trial.³⁵ Religious toleration is exemplified in several cases sustaining exceptions to the use of coarse and filthy declamations against Jews and Catholics on the score

of their religion.³⁶ Reference to an execution creditor as a Jew without a conscience "who would take the last thing you had" was held improper.³⁷ And where on the trial plaintiff was denounced by counsel as "a Jew, a Christ killer, a murderer of our Savior," it was held reversible error.³⁸ But where counsel in commenting upon the testimony of a witness known to be a Jew asked: "Gentlemen of the jury, will you believe this little Israelite?" it is not reversible error.³⁹

Appeals to local prejudice are also improper and also a ground for new trial or reversal when not promptly checked by the court or the jury instructed to ignore the remarks. "Stand by your own citizens!" exclaimed counsel, and a new trial was granted.⁴⁰ Reference to "public opinion" is objectionable,⁴¹ and the prosecuting attorney has no right to tell the jury that the people of the country would rather the prisoner should be turned loose than sent to the penitentiary for manslaughter. In granting a new trial, Grant, J., said: "There must be no question or suspicion of unfairness in criminal trials."⁴² In damage suits against corporations it is not deemed harmful for plaintiff's counsel to make the proverbial point that the defendant has neither soul nor feeling.⁴³ Characterizing a railroad company as a "monster" or that the employees of a corporation have become "hard-hearted and unfeeling," are not such transgressions of the rules of proper argument as to warrant a reversal.⁴⁴ General allusions to the power of corporations are not discountenanced, and the courts seem to be a little more indulgent to plaintiff's counsel in this class of cases than in litigation between individuals.⁴⁵ But

³¹ *Wabash Ry. Co. v. Billings*, 212 Ill. 37.

³² *Ill. Cent. R. Co. v. Seltz*, 111 Ill. App. 242; *McKee v. St. Louis T. Co.*, 108 Mo. App. 470; *Ft. Smith L. Co. v. Cathey* (Ark.), 86 S. W. Rep. 806; *McDonald v. Champion I. & S. Co.* (Mich.), 12 Det. Leg. N. 208, 103 N. W. Rep. 829; *Hluurod Coal Co. v. Beckwith*, 111 Ill. App. 379; *Jung v. Theo. Hamm B. Co.* (Minn.), 104 N. W. Rep. 233; *Louisville & Nashville R. Co. v. Smith* (Ky.), 84 S. W. Rep. 755.

³³ *Sullivan v. Deiter*, 86 Mich. 404; *Schillinger v. Verona* (Wis.), 60 N. W. Rep. 272; *State v. Helm* (Ia.), 61 N. W. Rep. 246; *Chicago City Ry. Co. v. Barron*, 87 Ill. App. 469; *Missouri, K. & T. Ry. Co. v. Woods* (Tex. Civ. App.), 25 S. W. Rep. 741.

³⁴ *E. St. L. Conn. Ry. Co. v. O'Hara*, 150 Ill. 580; *Morehouse v. Heath*, 99 Ind. 509.

³⁵ *Chicago U. T. Co. v. Lawrence*, 211 Ill. 373, 71 N. E. Rep. 1024; *Ill. Cent. R. Co. v. Jolly* (Ky.), 84 S. W. Rep. 330; *Olney v. Boston & M. R. Co.* (N. H.), 59 Atl. 387; *Hughes v. Chicago, etc.*, R. Co. (Wis.), 99 N. W. Rep. 897.

³⁶ *Moss v. Sanger*, 75 Tex. 321; *Freeman v. Dempsey*, 41 Ill. App. 554; *Cluett v. Rosenthal*, 100 Mich. 193, 58 N. W. Rep. 1009; *Fathman v. Tumility*, 34 Mo. App. 236.

³⁷ *Day v. Ferguson* (Ark.), 85 S. W. Rep. 771.

³⁸ *Freeman v. Dempsey*, 41 Ill. App. 554.

³⁹ *Texas Standard Oil Co. v. Hanlon*, 79 Tex. 678.

⁴⁰ *Rochester School Town v. Shaw*, 100 Ind. 268.

⁴¹ *Kennedy v. State*, 19 Tex. App. 618.

⁴² *State v. Young*, 105 Mo. 634. See also *Geist v. Detroit City Ry. Co.*, 91 Mich. 446; *Grosse v. State*, 11 Tex. App. 377; *Jackson v. State*, 116 Ind. 464; *Thompson v. State*, 33 Tex. Crim. Rep. 472, 26 S. W. Rep. 987.

⁴³ *Texas, etc., R. Co. v. Raney*, 23 S. W. Rep. 341; *Lake Erie, etc., R. Co. v. Cloes*, 5 Ind. App. 444.

⁴⁴ *Retan v. L. S., etc., R. Co.*, 94 Mich. 155; *Williams v. Cleveland, etc., R. Co.*, 102 Mich. 537, 61 N. W. Rep. 52; *Lake Erie, etc., R. Co. v. Cloes*, 5 Ind. App. 444.

⁴⁵ *Central R. Co. v. Mitchell*, 63 Ga. 173; *Jenkins*

there are boundaries beyond which he goes at the risk of having a favorable verdict upset. Among the many unwarranted departures from the record which the cases show is one in Texas where a railroad company was sued for negligently killing some boys; a large verdict was reversed because the plaintiff's counsel conducted the jury in imagination to New York, there to view a certain railroad magnate "in his princely mansion, surrounded by all that wealth can give." "There is the corporation," exclaimed counsel. "What does he care for the lives of these boys? There is only one thing to make him care, and that is twelve men of this county."⁴⁶ Great latitude has always been permitted to counsel in appealing to the sympathies of the jury. It is the advocate's prerogative to expatiate upon the evils of crime, and to depict in sombre colors the baseness of the creature who would oppress the widow and orphan. It is no fault of his, nor an abuse of his high privilege, that his widowed client should, in full view of the jury, melt into tears at her champion's impassioned recital of her wrongs.⁴⁷ All this is within the fair bounds of legitimate argument. But there is, after all, a limitation to such stage performances. If the evident purpose and natural effect of counsel's zeal and eloquence are to unduly excite prejudice and so obscure the real points involved, it is the duty of the court in its sound discretion, to interpose and direct the discussion into legitimate channels.⁴⁸

A Tennessee case presents the novel question of the right of counsel to shed tears. It was assigned as error that by such conduct the counsel for the plaintiff "unduly excited the passions and sympathies of the jury in favor of the plaintiff and greatly prejudiced them against defendant." The supreme court took the view that it is the right and privilege of counsel to shed tears, and intimated that at times it is his bounden duty, and that he should not be restrained unless he indulges so excessively as to embarrass the business of the court. The court, in saying

that no cast-iron rule in this regard should be laid down, observed: "To do so would result that in many cases clients would be deprived of the privilege of being heard at all by counsel. Tears have always been considered legitimate arguments before the jury, and we know no power or jurisdiction in the trial court to check them. It would appear to be one of the natural rights of counsel, which no statute or constitution could take away; it is certainly a matter of the highest personal privilege. Indeed, if counsel have tears at command, it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises, and the trial judge would not feel constrained to interfere unless they are indulged in to such excess as to impede, embarrass, or delay the business before the court. In this case the trial judge was not asked to check the tears, and it was, we think, a very proper occasion for their use, and we cannot reverse for this reason."⁴⁹

There are many adjudications to the point that counsel who travel out of the record are restrained on the principle of equitable estoppel from complaining if the opponent makes a pertinent reply.⁵⁰ But the latter has not by any means an unlimited license under such circumstances. Thus where counsel expressed his regret at the absence of a witness and asserted that diligent efforts had been made to secure his attendance, a counter-statement that the witness had been tampered with by the party whose counsel alluded to his absence was held, to be a manifestly unfair retort.⁵¹

Where counsel make statements outside of the record in the argument to the jury, to render the offense a ground for a new trial, it is nearly always necessary that the opposite party shall interpose a timely objection and except to an adverse ruling thereon.⁵² But

v. North Car., etc., Co., 65 N. Car. 563; Chicago, B. & Q. R. Co. v. Perkins, 125 Ill. 127.

⁴⁶ Dillingham v. Scales, 78 Tex. 205. See also Chicago, etc., R. Co. v. Bragonier, 13 Ill. App. 467.

⁴⁷ Dowdell v. Wilcox, 64 Iowa, 721.

⁴⁸ Davis v. Hill, 75 N. Car. 224; Evans v. Trenton, 112 Mo. 390.

⁴⁹ Ferguson v. Moore, 98 Tenn. 342, 39 S. W. Rep. 341.

⁵⁰ Marder, Luse & Co. v. Leary, 137 Ill. 319; Galvin v. Meridian Nat. Bank, 129 Ind. 439; Merritt v. N. Y., etc., R. Co., 162 Mass. 326; Minor v. Lorman, 66 Mich. 530; Huckshold v. St. L., I. M. & S. R. Co., 90 Mo. 548; Tex. & P. Ry. Co. v. Garcia, 62 Tex. 285; Higgins v. N. Car. R. Co., 52 N. Car. 470.

⁵¹ Augusta, etc., R. Co. v. Randall, 85 Ga. 291. See also Bennett v. State, 86 Ga. 405; State v. Helm (Ja.), 61 N. W. Rep. 246.

⁵² Kansas City, etc., R. Co. v. Webb, 97 Ala. 157; Nelson v. Shelby Mfg. Co., 96 Ala. 515; Ozburn v.

it has been held that though remarks were not objected to, where counsel intentionally goes outside of the record and indulges in remarks clearly prejudicial and which must have been made for the purpose of influencing the jury, the verdict must be set aside.⁵³ If the court rebukes counsel, and instructs the jury to disregard the improper remarks, this will usually be sufficient to counteract the evil.⁵⁴ And it is the court's duty on objection to exclude improper statements⁵⁵ and to promptly stop counsel when guilty of any misconduct, explain to the jury the impropriety of his remarks and take steps to prevent its repetition,⁵⁶ even though no objection has been interposed.⁵⁷

The appellate court will not as a rule reverse a judgment unless it appears that under all the circumstances the rights of the defeated party were materially prejudiced.

To sum up, it would seem from the collation of the foregoing authorities, that counsel must be careful to make no comment upon matters not in evidence, whether of an evidentiary or prejudicial nature, which might be calculated to influence the minds of the jurors to the prejudice of the opposing party. Calling attention to the bad character or other crimes or trials of defendant, unnecessary and unwarranted vilification and abuse, are to be guarded against in argument, although it seems that where such abuse amounts merely to a misstatement of fact, and may properly call for a rebuke as an offense against the dignity of

the court, it is not a ground for a new trial. The allusion to the wealth or poverty of parties, unless it is a fact in evidence, is improper, and ground for reversal. Coarse abuse and denunciatory allusions to the nationality or religion of a party, even if permitted by the court and the bad taste of counsel, when not supported by evidence, should never be indulged in, and appeals to local prejudice are also objectionable.

It is not uncommon for plaintiff's counsel in actions for personal injuries against corporations to attempt to inflame the minds of the jury by "froasts," and comments upon matters of more or less irrelevancy to the facts in issue. We can only call attention to the numerous skeletons of reversed cases as a warning to the too eloquent pleader. Appeals to the sympathies of the jury within limits is the advocate's prerogative, and if his zeal and eloquence can further his client's interests, it is his duty to employ them, and even shed tears, for there are many pathetic cases that might well call for tears.

It would seem the proper practice, where counsel stray outside of the record in arguments to the jury, to interpose a timely objection and except to an adverse ruling, but if the court rebukes the offender and properly instructs the jury, whereby any damage done is deemed remedied, the appellate court will not reverse, unless, of course, it clearly appears the rights of the defeated party were materially prejudiced. Inasmuch as the rights of litigants demand and the law awards the largest and most liberal freedom of speech in the trial of causes consistent with justice and fairness and the orderly and decorous administration of the judicial functions of the court, it is impossible here to lay down cut and dried rules covering this subject. The range of discussion is often necessarily wide, and it is difficult for counsel at all times to restrain their zeal and confine the argument within strictly legitimate bounds, and it is the duty of the trial judge to exert the powers vested in him and properly admonish counsel, and the duty of counsel when thus reminded of his transgression, to desist.

MORTON JOHN STEVENSON.

Chicago.

State, 87 Ga. 173; *Booner v. People*, 148 Ill. 440; *State v. Taylor*, 118 Mo. 153; *Mykleby v. Chicago, etc.*, R. Co., 49 Minn. 457; *Crumpton v. United States*, 138 U. S. 361; *Brooker v. Filkins*, 25 N. Y. Supp. 514; *Byrd v. Hudson*, 113 N. Car. 203; *Morgan v. Duffy*, 94 Tenn. 686; *Hencke v. Milwaukee City Ry. Co.*, 69 Wis. 401.

⁵³ *Houston, etc., R. Co. v. Rehm (Tex.)*, 82 S. W. Rep. 526; *Donald v. Champion Iron & Steel Co.*, 12 Det. Leg. N. 208, 103 N. W. Rep. 829; *Union Pac. Ry. Co. v. Field*, 137 Fed. Rep. 14.

⁵⁴ *Chicago City Ry. Co. v. Van Vleck*, 143 Ill. 480; *Carter v. Carter*, 101 Ind. 450; *Egan v. Murray*, 80 Iowa, 180; *Talmage v. Smith*, 101 Mich. 370; *State v. Reid*, 39 Minn. 277; *Willison v. Smith*, 60 Mo. App. 469; *Cole v. Fall Brook C. Co.*, 87 Hun. 584, 34 N. Y. Supp. 572; *Hogan v. Missouri, etc., R. Co.*, 88 Tex. 679; *Grace v. McArthur*, 76 Wis. 641.

⁵⁵ *Ill. Cent. R. Co. v. Jolly (Ky.)*, 84 S. W. Rep. 330.

⁵⁶ *Supreme Lodge, etc., v. Jones*, 113 Ill. App. 241.

⁵⁷ *Donald v. Champion Iron & Steel Co.*, 12 Det. Leg. N. 208, 103 N. W. Rep. 829; *St. L. S. W. R. Co. v. Boyd (Tex.)*, 88 S. W. Rep. 509.

CONSTITUTIONALITY OF STOCK LAW.

BROWN v. THARPE.

Supreme Court of South Carolina, April 17, 1906.

Act Dec. 22, 1892 (21 St. at Large, p. 360), exempting a certain portion of a named county from the operation of the general stock law between certain dates in each year, does not violate Const. art. 1, § 5, and the fourteenth amendment to the federal constitution, by denying the equal protection of the laws, in that it imposes on citizens in said exempt section the burden of fencing the cultivated lands, when the same burden is not required of other citizens of the county.

A court cannot declare a statute void, unless it manifestly violates some constitutional principle, and cannot overturn it because of its opinion as to the policy, wisdom and expediency and adequacy of the law.

JONES, J.: This appeal involves the constitutionality of the act approved December 22, 1892 (21 St. at Large, p. 360), exempting a designated portion of Williamsburg county from the operation of the general stock law from the 15th day of December each year to the 15th day of April following each year. The plaintiff and defendant are residents near the center of the exempted territory. The defendant in February, 1905, seized and impounded two cows of the plaintiff found upon his land, and after notice, was proceeding to have the cattle advertised and sold by a magistrate when the plaintiff brought this action in claim and delivery before Magistrate W. P. Baldwin. The defendant sought to justify his seizure of the cattle on the ground that the exemption from the general stock law was unconstitutional. The magistrate sustained the act and found judgment against defendant, and this judgment on appeal was affirmed by the circuit court, Judge Klugh, from which defendant appeals, alleging the unconstitutionality of the act in the particulars which we now consider.

1. Section 1, Art. 12, of the Constitution of 1868, has no application, as that provision expressly relates to personal rights, which are not involved in this contention.

2. It is contended that the act violates article 1, § 5, of the state constitution, and the fourteenth amendment of the federal constitution, by denying the equal protection of law, in that: (1) It imposes upon citizens in said exempt section the burden of fencing the cultivated lands when the same is not required of other citizens of Williamsburg county; (2) in compelling citizens along the boundary line to pay the penalty, if their stock should wander across the boundary line. The statute in question merely exempts the designated territory from the operation of the general stock law for the time specified, and does not undertake to legislate in any other respect. If it be competent for the legislature to prescribe police regulations for a particular locality, any inconvenience which results to those living near the boundary line because of their proximity thereto must be borne as the natural consequence of the valid legislation. The case of *Goodale v.*

Sowell, 62 S. C. 524, 40 S. E. Rep. 970, shows that it was not unconstitutional for the legislature in 1892 to enact a statute exempting certain portions of a county from the operation of the general stock law. The statute applies equally to all within the exempted territory. The equality clauses of the state and federal constitutions are not violated, when all within a designated and reasonable classification are treated alike. *State v. Berlin*, 21 S. C. 296, 53 Am. Rep. 677; *Utsey v. Hiott*, 30 S. C. 365, 9 S. E. Rep. 338, 14 Am. St. Rep. 910; *Simmons v. Telegraph Co.*, 63 S. C. 430, 41 S. E. Rep. 521, 57 L. R. A. 607; *Johnson v. Spartan Mills*, 68 S. C. 356, 47 S. E. Rep. 695.

3. It is further contended that the statute violates article 1, § 23, of the Constitution of 1868, and article 1, § 17, of the Constitution of 1895, in that it takes private property for private and public use without the consent of the owner and without compensation. This question is concluded against appellant by the case of *Goodale v. Sowell*, 62 S. C. 516, 40 S. E. Rep. 970.

4. The remaining exceptions assign as objections to the statute: (1) That the lines of the designated territory are not clearly defined; (2) that the statute contains no adequate and effective means of carrying out its provision; (3) the consequences of the act are against common right and reason. The policy, wisdom, expediency and adequacy of a statute are legislative questions. The courts cannot declare a statute void, unless it manifestly violates some constitutional principle. *Seegers v. Seaboard Air Line*, 73 S. C. 74, 52 S. E. Rep. 797.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

NOTE.—A Court Cannot Declare a Statute Void Because of its Opinion as to the Policy, Wisdom, Expediency and Adequacy of the Law.—The principal case is one which has no difficult question to solve, and yet it is one which may be of considerable practical value in view of the probable frequency with which it may recur, not only with regard to the stock law, but in other matters. There is no question but that it is an aggravation to live on the borders of such districts as those in question in the principal case, and there is, no doubt, some considerable force in the argument that the parties on the borders are made to bear the burdens which others do not who are not similarly situated. Yet a court may not, as said in the principal case, "declare a statute void unless it manifestly violates some constitutional principle, or is unreasonable or even absurd." *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248. In the latter case the court said it has been urged in the argument that the statutes under discussion were null and void, being against plain and obvious principles of common right and common reason. We do not perceive anything in these acts in derogation of common right. Their provisions are not confined to any particular individual or set of men, by name, separate and apart from the rest of the community. All may entitle themselves to the benefit of the remedy which they prescribe, by being employed in the navigation of the water-courses therein designated. No one is excluded from this privilege. There are many of our statutes, as that, for instance, which authorizes

money or other valuable effects lost at gaming, to be recovered back, which are confined in their operation to a much smaller number of persons than those embraced by the acts in question and which can be pursued by persons who have that particular class of rights to enforce, yet which have never been esteemed as conferring exclusive privileges. Let us examine for a moment the other branch of the proposition, which affirms that statutes passed against the plain and obvious principles of common reason are absolutely invalid. Such, I am aware, was the language of the court in *Ham v. McClaws*, 1 Bay, 98, and in *Morrison v. Barksdale*, 1 Harp. 102.

The court, adopting the identical words of Judge Blackstone (1 Com. 91), lays it down as one of the received rules in the construction of the statutes, that if absurd consequences, or those manifestly against common reason, arise collaterally out of a statute, it is void *pro tanto*. And this doctrine is to be found scattered through the authorities, from Lord Chief Justice Holbert's day down to the present period. He held that an act of parliament made against natural justice, or to make a man a judge in his own cause, was void in itself, for he says *jura naturae sunt immutabilia*, and they are *legus legum*. *Day v. Savadge*, Hob. 87. "I cannot subscribe to this doctrine, especially in its application in this country, where the powers and province of each department of the government are so accurately defined." And adopting the language of Mr. Christian, "with deference to these authorities, I should conceive that in no case whatever can a judge oppose his own opinion and authority to the clear will and declaration of the legislature," so long as it acts within the pale of its constitutional competency. The province of the court is to obey the mandates of the supreme power of the state, however absurd and unreasonable they may appear. And such would appear to be the opinion of Judge Blackstone himself. For, on the same page which has just been cited, he maintains that the legislature is in truth the sovereign power; that its authority is absolute, acknowledging no superior on earth.

It would seem that the facts in the principal case would not come within a long way of the inhibition of Judge Blackstone's example. Says Judge Christiancy: "The legislative power of the state is supreme, except so far as limited by the constitution." *Sears v. Cottrell*, 5 Mich. 258. It was said by Green, J., that "an act may be pronounced void because it is against the plain and obvious dictates of reason." *Bank of State v. Cooper*, 24 Am. Dec. 517. This is contrary to the doctrine in the principal case, but it is held in *Pierce v. Kimball*, 9 Greenleaf, 54, 23 Am. Dec. 537, that a supposed injustice or inequality is not a sufficient ground for declaring a statute void.

JETSAM AND FLOTSAM.

THE "UNWRITTEN LAW."

*At the meeting of the American Bar Association in August last, Hon. Thomas J. Kernan, of Baton Rouge, Louisiana, read a paper on "The Unwritten Law, or Lawless Rights and Lawful Wrongs." By far the best thing contained was the following codified "decatalogue" of the "Unwritten Law":

"Law I. Any man who commits rape upon a woman of chaste character shall, without trial or hearing of any kind, be instantly put to death by his captors, or other body of respectable citizens not less than three

in number; and they shall have the right to determine the mode of execution, which may be both cruel and unusual, the constitution and laws of the State and of the United States to the contrary notwithstanding.

Law II. Any man who commits adultery may be put to death with impunity by the injured husband, who shall have the right to determine the mode of execution, be it ever so cowardly.

Law III. Any man who seduces an innocent girl may, without a hearing, be shot or stabbed to death by her, or any near relative of hers; and if deemed necessary by the slayer such shooting or stabbing may be done in the back, or while lying in wait.

Law IV. Any man who traduces a virtuous woman's character for chastity may be shot with impunity by her, or her husband, or any near relative; but the offender must first be given an opportunity to deny or disprove the charge, or to retract or apologize.

Law V. The survivor of a fatal duel must be acquitted if the duel was fairly conducted according to the time-honored provisions of the code of honor.

Law VI. Any man who kills another in a fair fight shall not be found guilty either of murder or manslaughter, but must be acquitted, even though he be the sole aggressor.

Law VII. The lie direct and certain other well known opprobrious epithets which constitute moral insult are each equal to a blow, and any of them justifies an assault.

Law VIII. In prosecution for stealing horses, cattle or hogs, the presumption of innocence is shifted in favor of the live stock, and the accused is presumed to be guilty.

Law IX. In all civil suits by natural persons against corporations, the defendant corporation is presumed to be liable, and can establish want of liability only by a clear and decided preponderance of evidence.

Law X. In every action by employee against employer for personal injury the plaintiff shall recover damages unless the defendant employer proves want of liability beyond a reasonable doubt; and in all such cases the measure of damages shall be the pitiful condition of the plaintiff, the sympathy of the jury and the ability of the employer to pay."

Mr. Kernan's address consisted largely of the ordinary diatribe against lynching and other forms of lawlessness. He said, among other things: "The indicated remedy is necessarily legal, and it is the first duty of American lawyers to discover and apply the remedy." In our view the remedy is *not* primarily legal. This clever burlesque code is based upon and finds its point in jury abuses. The "Unwritten Law" springs from the circumstance that the jury will *not* accept and follow the law as declared by the court. The remedy, therefore, lies in an appeal to public opinion, and it is desirable that our brethren of the secular press circulate and comment upon Mr. Kernan's formulation of the "Unwritten Law," which, facetious as it may seem in the abstract, is only slightly, if at all, exaggerated as an expression of actual jury practices.—*New York Law Journal*.

THE DECADENCE OF A LAW BOOK.

In looking over the shelves of a law library we are often struck with text books and treatises now obsolete, but which once were flourishing standard works and in daily professional use. How is it, we wonder, that they have come to this—to cumber the shelves? There is something, no doubt, in the reason which Lord Bowen gave for not writing a law book, "You write a history of law or a treatise about it, and then a puff of reform comes and alters it all, and makes your

history or treatise useless." We have frequently had such a "puff of reform" in recent days, and it has wrecked, for the time being, many a legal craft; but anon the book refits, trims its sails, and is off again gallily in a new edition. Then why, it may be said, with this power of rehabilitation, should a good law book ever die? and yet we know they do, even the best. Where, for instance, is "Sugden on Vendors and Purchasers," or "Sugden on Powers?" Where is "Wordsworth on Companies," and "Rose on Bankruptcy," and "Selwyn's Nisi Prius?" Where is "Tidd's Practice," and "Lush's Practice," and "Jervis?" Where is "Williams," "Saunders," and "Burns' Justice of the Peace?" Has the high reputation of any of them saved them from oblivion? It seems as though every law book had its life, which, like the natural life of man, may not be prolonged beyond a certain term; indeed, we can see the process of decadence going on around us every day—though it were invidious to particularize—the waning popularity of well known works of once high repute. Edition follows edition at intervals of five or ten years; new acts and new cases are noted; but the impulse derived from the creative genius of the author is spent, and the book becomes a mechanical compilation. Meanwhile a rival book has sprung up, and the older work "gins to pale its effectual fire." The perpetual putting of new patches on the old garment finds its Scriptural fulfillment. A book to live must, in fact, after a certain time, be rewritten; it must, that is, have a fresh inspiration breathed into it from a new master mind.—*London Law Journal.*

BOOKS RECEIVED.

Treatise on the Law Governing Nuisances, with particular reference to its application to modern conditions and covering the entire law relating to public and private nuisances, including statutory and municipal powers and remedies, legal and equitable. By Joseph A. Joyce and Howard C. Joyce. Albany, N. Y., Matthew Bender & Co. 1906. Buckram. Price, \$6.30. Review will follow.

HUMOR OF THE LAW.

A shoemaker was taken up for bigamy.

"Which wife," asked a bystander, "will he be obliged to take?"

"He is a cobbler," replied another, "and of course must stick to his last."

The following is a notice served by a South Carolina magistrate on defendant's attorney, whose motion for a nonsuit was overruled, and who gave notice of intention to appeal from the order. Names omitted:

"Dear Sir: In above stated case in your motion for nonsuit which I declined to sustain, I beg to say I so decided because I saw that common justice to the plaintiff would have been thwarted had I acted otherwise. The only witness who testified was the plaintiff, and he to my mind clearly proved his claim. There was nothing in reply on the part of the defense. Mere technicalities was used that I believed were used only as a hinderance to clog the collection of a just claim—that could not be denied. So far as the defendant not having received any benefit, was not sustained. Your client knew the consideration was a policy on the life of his wife, payable to him. Again, the defendant never denied the validity of the debt, he had fre-

quently admitted. Therefore, believing that a magistrate's court has a greater latitude or scope, in other words, is not bound to regard as rigidly all the uncertain mistifications of technicalities that governs in the upper court—where the letter of the law is cut to with too close a precision. With magistrates—I think they are permitted to use with common sense the spirit of the law, common justice between man and his fellow-man. Now, this is not an official paper, but merely an honest statement of opinion and belief, and not intended as an argument to be used by you in your appeal, for I do not intend to place a cudgel that may be used to crack my skull, for I am no lawyer.

Your friend,

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. ACCIDENT INSURANCE—Fidelity Bonds.—An insurer in a bond to indemnify an employer held relieved from liability on failure of the employer to give the required notice of a loss sustained by the dishonesty of the employee.—*Supreme Ruling of Fraternal Mystic Circle v. National Surety Co.*, 95 N. Y. Supp. 1033.

2. ACCORD AND SATISFACTION—Validity.—Contract to pay a certain sum less than a sum formerly agreed to be paid, but the payment of which is contingent and unmaturing, held binding, though not executed.—*Bandman v. Finn*, N. Y., 78 N. E. Rep. 175.

3. AGRICULTURE—Liens on Crops.—The privilege for advances conferred by Civ. Code, art. 3217, is not confined to the growing crop, but bears upon the products after they are severed from the soil, and follows them into the hands of the purchaser.—*National Bank of Commerce v. Sullivan, L.A.*, 41 So. Rep. 430.

4. ANIMALS—Running at Large.—Under the laws of Idaho, live stock, with certain exceptions, may run at large and roam and graze over and upon any of the uninclosed lands of the state, and the same will not amount to actual trespass against the owner of the land.—*Swanson v. Groat*, Idaho, 85 Pac. Rep. 384.

5. APPEAL AND ERROR—Bill of Exceptions.—Where a demurrer was stricken from the files on motion, it could

only be incorporated in the record on appeal by bill of exceptions.—*Commissioners' Court of Chilton County v. State, Ala.*, 41 So. Rep. 463.

6. **APPEAL AND ERROR—Case Tried by Court.**—Where an action at law is referred to the court for decision, the question whether there is any evidence to support the decision is one at law, but if there be any such evidence the force of it is a question of fact.—*Prescott v. Inhabitants of Winthrop, Me.*, 63 Atl. Rep. 923.

7. **APPEAL AND ERROR—Contributory Negligence.**—The court of appeals held without jurisdiction to determine whether there was evidence sufficient to sustain a verdict on the plea of contributory negligence in an action for injuries to a servant, which verdict has been unanimously affirmed by the appellate division.—*Madden v. Hughes, N. Y.*, 78 N. E. Rep. 167.

8. **APPEAL AND ERROR—Decisions Reviewable.**—The supreme court has jurisdiction to review the final order of the circuit court in an election contest for a county office, where the value of the office is greater than \$100.—*Williamson v. Musick, W. Va.*, 53 S. E. Rep. 706.

9. **APPEAL AND ERROR—Dismissal of Appeal.**—Where the state appeals from an order discharging defendant charged with murder, and the defendant is hanged by a mob, the appeal will be dismissed.—*State v. Rogers, La.*, 41 So. Rep. 477.

10. **APPEAL AND ERROR—Excessive Damages.**—In an action for personal injuries, failure to allow anything for the other elements of damage than for mental suffering held not an indication that the jury were influenced by passion or prejudice, or that the sum allowed is excessive.—*Missouri, K. & T. Ry. Co. v. Wade, Kan.*, 55 Pac. Rep. 415.

11. **APPEAL AND ERROR—Review.**—Where the evidence does not appear in the record on appeal, instructions, to be ground for reversal, must have been erroneous under any possible state of facts appearing at the trial.—*Donovan McCormick v. Sparr, Mont.*, 55 Pac. Rep. 1029.

12. **ASSOCIATIONS—Liability of Members.**—An action under V. S. 1183, against the members of an unincorporated association to enforce individual liability on a judgment obtained against the association under section 1099, held properly brought by trustee process under section 1804.—*F. R. Patch Mfg. Co. v. Capeless, Vt.*, 63 Atl. Rep. 993.

13. **ATTACHMENT—Money with Clerk of Court.**—Where money is attached in the hands of the clerk of the district court, judgment on plaintiff should not be disturbed because before the actual service of the attachment the attorney of defendants had instructed the clerk to transfer the money to his account.—*Morris v. Hart & Barnes, N. J.*, 63 Atl. Rep. 903.

14. **ATTORNEY AND CLIENT—Claim of Lien.**—An attorney cannot be compelled in summary proceedings to surrender property on which he claims a lien, unless he obtained possession in proceedings taken in the course of his professional employment.—*In re Edward Ney Co.*, 58 N. Y. Supp. 982.

15. **ATTORNEY AND CLIENT—Unconscionable Contract.**—Whether a contract to pay an attorney half the recovery for prosecuting an action is unconscionable held to depend on the circumstances of each case.—*Morehouse v. Brooklyn Heights R. Co., N. Y.*, 78 N. E. Rep. 179.

16. **BAIL—Action on Bond.**—In an action on a bail bond, the complaint held not insufficient, under Rev. St. 1902, § 1282, because it did not state facts showing the jurisdiction of the justice to make the order holding to answer, or because, it did not allege that the order was duly made.—*Thomas v. Territory, Ariz.*, 55 Pac. Rep. 1063.

17. **BANKRUPTCY—Appeals.**—An appeal in bankruptcy neither from a judgment adjudging or refusing to adjudge the defendants bankrupts, nor from a judgment denying or granting a discharge, nor from a judgment allowing or rejecting a claim of \$500 or over, does not lie.—*In re McCasland & Leftwich, Okla.*, 55 Pac. Rep. 1118.

18. **BANKRUPTCY—Property Passing to Trustee.**—Property adjudicated to one after, but as of a date prior to,

the filing of his petition in bankruptcy, held not after-acquired property.—*McNaboe v. Marks*, 99 N. Y. Supp. 960.

19. **BANKS AND BANKING—Assignment of Deposit.**—A depositor in a savings bank may transfer his interest in his deposit for a valuable consideration without the delivery of the pass book representing the deposit.—*Augsbury v. Shurtliff*, 98 N. Y. Supp. 989.

20. **BANKS AND BANKING—Stockholder's Liability.**—The liability of a stockholder in a banking corporation, imposed by Const. Neb. 1875, art. 11b, § 7, held enforceable in equity only.—*Hazelett v. Woodhead, E. I.*, 63 Atl. Rep. 952.

21. **BOUNDARIES—Artificial Bodies of Water.**—A conveyance of land as bounded by a water reservoir held, on the abandonment of the reservoir, not to call for the property up to a brook forming the boundary of the lot prior to the erection of the reservoir.—*Dillon v. Burke, N. H.*, 63 Atl. Rep. 927.

22. **BROKERS—Commissions.**—Though a contract for broker's services is required by Civ. Code, § 2185, to be in writing and subscribed by the party to be charged or his agent, a recovery on complete performance may be had on a *quantum meruit*.—*Blankenship v. Decker, Mont.*, 55 Pac. Rep. 1035.

23. **CARRIERS—Delay in Delivery.**—Where a common carrier negligently delays the delivery of freight so that the damages occasioned exceed the freight due, consignee may demand the delivery of the goods without payment of the freight.—*Missouri Pac. Ry. Co. v. Peru-Van Zandt Implement Co., Kan.*, 55 Pac. Rep. 408.

24. **CARRIERS—Failure to Provide Attendant for Mare.**—Where an attendant was not reasonably necessary for the safe transportation of a mare, carrier was not guilty of negligence in failing to provide one.—*Ames v. Fargo*, 98 N. Y. Supp. 994.

25. **CARRIERS—Injuries to Passengers.**—Proof of a derailment of a street car and the resultant injury to a passenger held to raise a presumption of negligence on the company's part.—*Indiana Union Traction Co. v. McKinney, Ind.*, 78 N. E. Rep. 203.

26. **CHattel MORTGAGES—Deficiency Judgment.**—A chattel mortgagee may, in a foreclosure, join as defendant a grantee of the mortgagor who has assumed payment of the mortgage debt and recover a deficiency judgment.—*Kastner v. Fashion Livery Co., Ariz.*, 55 Pac. Rep. 120.

27. **CHattel MORTGAGES—Rights of Assignee.**—An assignee of a second chattel mortgage, took an assignment appointing him the assignor's agent to collect the indebtedness, held liable on satisfaction of the mortgages without foreclosure for the amount of the indebtedness.—*Wagner v. Wedell, Cal.*, 55 Pac. Rep. 126.

28. **CONSTITUTIONAL LAW—Due Process of Law.**—V. S. 1099, providing for a judgment binding all the members of an unincorporated association after service on an officer, is not violative of the fourteenth amendment to the federal constitution as a taking of property without due process of law.—*F. R. Patch Mfg. Co. v. Capeless, Vt.*, 63 Atl. Rep. 993.

29. **CONSTITUTIONAL LAW—Impairment of Contract.**—Mere understandings must give way before the exercise of the police power of the state in regulating the affairs of its municipal corporations as against the claim that such legislation will impair the obligation of contracts.—*School City of Marion v. Forrest, Ind.*, 78 N. E. Rep. 187.

30. **CONSTITUTIONAL LAW—Statutes Regulating Junk Dealers.**—The business of a junk dealer is subject to regulation under the police power of the state.—*State v. Cohn, N. H.*, 63 Atl. Rep. 928.

31. **CONTEMPT—Allegations on Information and Belief.**—In proceedings to punish for contempt, allegations on information and belief held sufficient to put accused to his denial.—*Hughes v. Territory, Ariz.*, 55 Pac. Rep. 1058.

32. **CONTRACTS—Ambiguity.**—Where it is proved that a promisee wrote a written contract, the burden is on him to remove any uncertainty as to its meaning, not-

withstanding Civ. Code, § 2219.—*Blankenship v. Decker*, Mont., 85 Pac. Rep. 1035.

33. **CONTRACTS—Entire or Severable.**—The question whether a contract is entire or whether its various stipulations are severable held a question of construction from the intent of the parties and all the circumstances.—*Sterling v. Gregory*, Cal., 85 Pac. Rep. 835.

34. **CONTRACTS—Separate Instruments.**—Where a note, deed and defeasance were executed at the same time and as a part of the same transaction, the deed being intended as a mortgage, they should all be construed as one instrument, under Civ. Code, § 2207.—*Bartels v. Davis*, Mont., 85 Pac. Rep. 1027.

35. **CORPORATIONS—Organization.**—To legally possess or exercise powers or privileges of corporations requires a sovereign grant.—*Spotswood v. Morris*, Idaho, 85 Pac. Rep. 1094.

36. **CORPORATIONS—Pleadings in Actions Against.**—Failure of declaration to allege compliance with statutory provisions necessary to constitute a company a mutual insurance company held not to render the declaration demurrable.—*Swing v. Consolidated Fruit Jar Co.*, N. J., 63 Atl. Rep. 899.

37. **CORPORATIONS—Registered Agent.**—Registered agent of corporation entering into a contract with it without having his appointment as registered agent canceled, cannot claim that corporation was doing business in the state without authorized agent as required by Act April 22, 1874 (P. L. 108).—*De La Vergne Refrigerating Mach. Co. v. Kollscher*, Pa., 63 Atl. Rep. 971.

38. **CRIMINAL EVIDENCE—Acts of Conspirators.**—Acts and declarations of one of several persons in pursuance of a common design held admissible in evidence against the others, if the existence of the conspiracy is established.—*Territory v. Neatherlin*, N. M., 85 Pac. Rep. 1044.

39. **CRIMINAL EVIDENCE—Attempt to Settle Prosecution.**—In a prosecution for rape, evidence that defendant had offered money to the foster father of prosecutrix to stop criminal proceedings was incompetent.—*Sanders v. State*, Ala., 41 So. Rep. 466.

40. **CRIMINAL LAW—Assisting in Prosecution.**—Attorneys other than the attorney general in the supreme court, or the county attorney in the lower court, may assist in the prosecution with the assent of the prosecuting officer.—*State v. Steers*, Idaho, 85 Pac. Rep. 104.

41. **CRIMINAL TRIAL—Commenting on Evidence.**—In a prosecution for murder, a remark of the court in admitting in defendant's behalf a transcript of the evidence taken at the coroner's inquest, held not prejudicial as a comment on the weight of the evidence.—*State v. Fuller*, Mont., 85 Pac. Rep. 369.

42. **CRIMINAL TRIAL—Cross Examination.**—Where, in a prosecution for homicide, a question asked of the state's witness on cross-examination was erroneously excluded, the error was not cured by the fact that the evidence sought was cumulative.—*State v. Trueman*, Mont., 85 Pac. Rep. 1024.

43. **CRIMINAL TRIAL—Larceny.**—On a prosecution for the larceny of a pocket, evidence as to the taking of a pocketbook and money held competent as constituting a part of the same transaction.—*Bradford v. State*, Ala., 41 So. Rep. 462.

44. **CRIMINAL TRIAL—Reasonable Doubt.**—An instruction directing an acquittal if any one of the jurors have a reasonable doubt as to accused's guilt is erroneous.—*Outler v. State*, Ala., 41 So. Rep. 460.

45. **CRIMINAL TRIAL—View of Place of Crime.**—In a case where the court orders the jury to view the place where it is alleged that the offense was committed, it is error for the court to deny the defendant the right to be present at such inspection if he requests in person or by counsel the privilege of being present.—*State v. McGinnis*, Idaho, 85 Pac. Rep. 1069.

46. **CUSTOMS AND USAGES—Effect as to Contract.**—Usage or custom of a business will enter into and form a part of a contract made by a person engaged therein.—*Savage v. Salem Mills Co.*, Oreg., 85 Pac. Rep. 69.

47. **DEDICATION—Plotting Land.**—The plotting of land by the owner and dividing it off by streets and avenues and selling lots with reference to a map showing the streets, amounts to a complete dedication of the streets thereon disclosed.—*City of Mobile v. Fowler*, Ala., 41 So. Rep. 468.

48. **DEDICATION—Sale with Reference to Plat.**—Where the owner of land sells lots or blocks according to a description in a plat, he is estopped from revoking the dedication of streets on plats.—*Thorpe v. Clanton*, Ariz., 85 Pac. Rep. 1061.

49. **DEEDS—Failure of Consideration.**—Husband having conveyed his property to his wife to induce her to assume marital relations, which she subsequently refused to do, but continued adulterous relations with her paramour, held entitled to a decree canceling the conveyance.—*Jennings v. Jennings*, Oreg., 85 Pac. Rep. 65.

50. **DEPOSITIONS—Suppression.**—A deposition of a witness held not inadmissible because the commissioner authorized to take it exceeded his power in also taking the deposition of another person.—*Southern Pac. Co. v. Wilson*, Ariz., 85 Pac. Rep. 461.

51. **EASEMENTS—Creation by Deed.**—That the owner of an easement to use the stairways and halls of an adjoining building paid rent therefor to the owner, held insufficient to show a release or relinquishment of the easement.—*Spencer v. Lighthouse*, 98 N. Y. Supp. 1015.

52. **ELECTIONS—Rejection of Returns.**—Before the certificate return of the result of an election can be rejected for fraud in the election, it must appear that the proceedings were so tainted with fraud as to change the result, or that the truth cannot be deduced from the return.—*Williamson v. Musick*, W. Va., 53 S. E. Rep. 706.

53. **EMINENT DOMAIN—Foreign Corporation.**—A foreign corporation which seeks to expropriate a right of way must meet objections to legality of its organization by proving the regularity thereof.—*Cumberland Telephone & Telegraph Co. v. St. Louis, I. M. & S. Ry. Co.*, La., 41 So. Rep. 492.

54. **EQUITY—Jurisdiction.**—Equity has no jurisdiction to compel the secretary of state to strike from a ballot to be voted at a general election certain words following the words "for amendment to the local option law."—*State v. Dunbar*, Oreg., 85 Pac. Rep. 837.

55. **EQUITY—Jurisdiction.**—A chancery court cannot pass upon the right of a municipal corporation to acquire and hold lands outside of its territorial limits.—*State v. Inhabitants of City of Trenton*, N. J., 63 Atl. Rep. 887.

56. **EQUITY—Submission to Jury.**—Where in an equity suit the court submits special questions of fact to a jury, the answers returned are advisory only.—*Tobin v. O'Brieter*, Okla., 85 Pac. Rep. 1121.

57. **EVIDENCE—Cross-Examination.**—A broad range of inquiry will be allowed on cross-examination of that class of witnesses commonly called "experts."—*Trull v. Modern Woodmen of America*, Idaho, 85 Pac. Rep. 1081.

58. **EVIDENCE—Foreign Statutes.**—Courts will not take judicial notice of foreign statutes not offered in evidence under which a company is organized.—*Cumberland Telephone & Telegraph Co. v. St. Louis, I. M. & S. Ry. Co.*, La., 41 So. Rep. 492.

59. **EVIDENCE—Weight of Positive and Negative Testimony.**—Testimony of witnesses that they heard the bell of an electric car ringing as it approached a crossing is of more weight than the testimony of others who say that they did not hear it ring.—*White v. Wilmington City Ry. Co.*, Del., 63 Atl. Rep. 931.

60. **EXECUTORS AND ADMINISTRATORS—Accounting.**—Under Const., Art. 18, § 6, and Code Civ. Proc. tit. 10, c. 13, a county treasurer is *ex officio* public administrator, and all fees and compensation received by him in his official capacity must be accounted for to his county.—*Appeal of Rice*, Idaho, 85 Pac. Rep. 1109.

61. **EXECUTORS AND ADMINISTRATORS—Partition by Heirs.**—A judgment recognizing heirs and decreeing that they are entitled to receive the estate from the exe-

cutrix, does not close the succession or authorize the heirs to partition the property.—*Succession of Landry, La.*, 41 So. Rep. 490.

62. **EXECUTORS AND ADMINISTRATORS—Set-Off.**—A defendant pleading by way of set-off a claim against decedent which had not been presented to the administrator, held not entitled to a judgment for any excess.—*Fishburne v. Merchants' Bank of Port Townsend, Wash.*, 85 Pac. Rep. 88.

63. **FALSE PRETENSES—Certified Checks.**—Banker receiving check certified by agent of bank who issued the check, held presumed to know that the bank was not primarily liable thereon.—*State v. Miller, Oreg.*, 85 Pac. Rep. 81.

64. **FALSE IMPRISONMENT—Joint Defendants.**—In an action for false imprisonment, joint defendants, joining in the unlawful imprisonment, though not present at the arrest, held liable for the whole trespass *ab initio*.—*Egleston v. Scheibel, 98 N. Y. Supp.* 969.

65. **FIRE INSURANCE—Insolvency.**—Where court authorized receiver to sue, and fixed percentage to be assessed on policies, the actual amount being fixed by the receiver, the policy holder cannot defend on ground that assessment is not fixed by directors as required by statute.—*Swing v. Consolidated Fruit Jar Co., N. J.*, 63 Atl. Rep. 899.

66. **FORCIBLE ENTRY AND DETAINER—Evidence.**—In forcible entry and detainer, where defendant claims to have entered peaceably under a bond for a deed, it was proper to admit in evidence the bond to show the character of defendant's entry and possession.—*West v. Comeaux, Kan.*, 85 Pac. Rep. 138.

67. **FORCIBLE ENTRY AND DETAINER—Amendment of Complaint.**—Where in forcible entry and detainer the complaint is founded on a notice which fails at the trial, plaintiff may be allowed to amend, and base his case on another notice, served more than three days before the commencement of the action.—*Best v. Frazier, Okla.*, 85 Pac. Rep. 1119.

68. **FRAUDS, STATUTE OF—Sale of Land.**—Agreement to make a certain lane the boundary between adjoining lands held not within the statute of frauds in regard to oral sales or transfers of real estate.—*Fleming v. Baker, Idaho*, 85 Pac. Rep. 1092.

69. **FRAUDULENT CONVEYANCES—Mortgages.**—Mortgage and note held void as to creditors, and it is immaterial whether the mortgagor was at the time of its execution solvent or insolvent.—*Ullman v. Lockhart, Fla.*, 41 So. Rep. 452.

70. **GIFTS—What Constitutes.**—To constitute a gift *causa mortis* it must appear that the delivery of the gift was accompanied by an act or declaration indicating that a gift *causa mortis* was intended.—*Hecht v. Shaffer, Wyo.*, 85 Pac. Rep. 1056.

71. **GUARDIAN AND WARD—Action by Guardian.**—Where a cause of action exists in favor of an infant, the action should be brought by a guardian *ad litem*, and not by a general guardian, except as trustee.—*Schlieder v. Wells, 99 N. Y. Supp.* 1000.

72. **HIGHWAYS—Damage to Abutting Owners.**—A town accepting a road built by owners of land held not entitled to dispose of the surface water coming on the road except in the manner required in properly repairing a public highway.—*Rudnyal v. Town of Harwinton, Conn.*, 63 Atl. Rep. 948.

73. **HIGHWAYS—Obstruction.**—Purchasers of land with reference to plat held not entitled to enjoin closing of streets unless specially injured by such action.—*Thorpe v. Clanton, Ariz.*, 85 Pac. Rep. 1061.

74. **HOMESTEAD—Mortgage.**—Though transactions in which the joinder of the wife is obtained to any disposition of the homestead will be vigilantly scrutinized, it will not relieve the wife from the consequences of her own act in executing a mortgage thereon.—*Bastin v. Schafer, Okla.*, 85 Pac. Rep. 849.

75. **HUSBAND AND WIFE—Damages for Injury to Wife.**—Where a wife injured by the negligence of another is

treated by a physician, the husband held entitled to recover the expenses incurred, together with damages resulting from the loss of services of his wife.—*Indiana Union Traction Co. v. McKinney, Ind.*, 78 N. E. Rep. 203.

76. **INDICTMENT AND INFORMATION—Allegations and Proof.**—There is no variance between an indictment alleging the name of a third person and the proof showing the name of such person.—*Caldwell v. State, Ala.*, 41 So. Rep. 473.

77. **INJUNCTION—Liability of Surety on Bond.**—Where a claim is made against the sureties on an injunction bond for costs, damages, or counsel fees, on breach of the bond the sureties are entitled to defend against the demand; and it is error to summarily enter judgment against them.—*Dougal v. Eby, Idaho*, 85 Pac. Rep. 102.

78. **INJUNCTION—Prosecution of Action.**—Assumpsit by a railroad contractor against a railroad company to recover for work will not be enjoined at the company's instance because creditors of such contractor have garnished the company.—*Deepwater Ry. Co. v. D. H. Motter & Co., W. Va.*, 53 S. E. Rep. 705.

79. **INJUNCTION—To Test Title to Office.**—*Quo warranto* and not injunction held the only remedy in an action to test the title of an appointee to a public office.—*Hubbell v. Armijo, N. M.*, 55 Pac. Rep. 1046.

80. **INTOXICATING LIQUORS—Regulations as to Sunday Closing.**—An ordinance of a board of excise commissioners of a city prohibiting a licensed liquor dealer from having a light burning in his place of business between certain hours on Sunday held not unreasonable.—*Croker v. Board of Excise Comrs. of City of Camden, N. J.*, 63 Atl. Rep. 237.

81. **JOINT STOCK COMPANIES—Statutes Governing Organization.**—As the constitution of Idaho and the statutes of the state do not prohibit the organization of joint-stock associations having transferable stock, the common-law rule as to their legality prevails in this state.—*Spotswood v. Morris, Idaho*, 85 Pac. Rep. 1094.

82. **JUDICIAL SALES—Foreclosure of Mechanic's Lien.**—A purchaser of property on foreclosure of a mechanic's lien held not entitled to recover damages for injuries to the property by the owner between the date the lien became effective and the day of the sale.—*Van Buskirk v. Summitville Min. Co., Ind.*, 78 N. E. Rep. 208.

83. **JUDGMENT—Construction.**—The court by rendering judgment in favor of a partner against a copartner for his interest in property acquired by the copartner by the use of the partnership property must have found that the copartner acquired the property with partnership property, and denied the right of the partner to share therein.—*Deaner v. O'Hara, Colo.*, 85 Pac. Rep. 1123.

84. **JUDGMENT—Setting Aside.**—Denial of an application to set aside a default judgment unless discretion has been abused will not be disturbed on appeal.—*Western Loan & Savings Co. v. Smith, Idaho*, 85 Pac. Rep. 1084.

85. **JUSTICES OF THE PEACE—Disagreement by Jury.**—Discharge of jury by justice of the peace because of disagreement held not to be considered on writ of error in the absence of bill of exceptions.—*Pointer v. Jones, Wyo.*, 85 Pac. Rep. 1050.

86. **LANDLORD AND TENANT—Interference with Business of Lessee.**—A cause of action by tenants or interference by their landlord with the business carried on on the leased premises held not affected by the payment of rent after the granting of an injunction against the carrying on of the business.—*Williams v. Getman, 98 N. Y. Supp.* 977.

87. **LANDLORD AND TENANT—Repairs by Landlord.**—A landlord who at the request of his tenant undertakes to repair defects on the leased property, and employs a mechanic to do the work, is chargeable with knowledge of the manner in which the work is done.—*Upham v. Head, Kan.*, 85 Pac. Rep. 1017.

88. **MASTER AND SERVANT—Contract of Employment.**—Whether employee was working under contract made in the state or in the foreign state in which he was at work held a question for the jury.—*Caldwell v. Seaboard Air Line Ry., S. Car.*, 53 S. E. Rep. 746.

89. **MASTER AND SERVANT—Defective Appliances.**—A servant held not guilty of contributory negligence in using material furnished by his master which was in fact unsafe for the construction of a scaffold, where the servant had no knowledge that the material was dangerous.—*Madden v. Hughes*, N. Y., 78 N. E. Rep. 167.

90. **MASTER AND SERVANT—Defective Appliances.**—A master held not chargeable with negligence in maintaining a defective derrick hook, in the absence of evidence that the defect in the hook was discoverable by inspection.—*New Castle Bridge Co. v. Steele, Ind.*, 78 N. E. Rep. 208.

91. **MASTER AND SERVANT—Fellow Servants.**—In an action by a servant for personal injuries, the defense of a common employment cannot prevail, unless the injured person and the servant whose negligence caused the injury were in the service of the defendant as a common master.—*Fisher v. Minegoux*, N. J., 63 Atl. Rep. 992.

92. **MASTER AND SERVANT—Negligence of Superintendent.**—To create a liability under Code 1896, § 1749, subd. 2, held necessary to show that the employee injured in consequence of the negligence of another employee was injured while the latter was exercising his duties of superintendence.—*Smith v. Pioneer Min. & Mfg. Co.*, Ala., 41 So. Rep. 475.

93. **MASTER AND SERVANT—Safe Place to Work.**—A master held not liable for the death of a servant caused by the dangerous character of the place in which the servant was required to perform his work, where the master had no control over such place.—*Long v. John Stephenson Co.*, N. J., 63 Atl. Rep. 910.

94. **MASTER AND SERVANT—Torts of Servants**—Restaurant keeper held liable for assault on guest by a servant acting within scope of his authority.—*Goodwin v. Greenwood*, Okla., 85 Pac. Rep. 1115.

95. **MECHANICS' LIENS—Proceedings to Enforce.**—In suit to foreclose lien, answer held not to present any issue as to whether plaintiff was estopped to claim full amount due him.—*Big Horn Lumber Co. v. Davis*, Wyo., 85 Pac. Rep. 1048.

96. **MINES AND MINERALS—Assessment Work.**—One who buys an interest in an unpatented mining claim at a void judicial sale and pays the assessment work due from the judgment debtor held not subrogated to the rights of the parties seeking the forfeiture, and his payment prevents the forfeiture as against the judgment debtor.—*Dye v. Crary*, N. M., 85 Pac. Rep. 1388.

97. **MINES AND MINERALS—Pleadings in Action to Recover.**—In an action to recover possession of unsurveyed government lands, wrongful possession by defendants, taken during temporary absence of plaintiffs held not to require proof of qualifications of plaintiffs to enter government land.—*Davis v. Dennis*, Wash., 85 Pac. Rep. 1079.

98. **MONEY PAID—Issues.**—In an action for price of stock purchased by defendant, the submission of the question whether plaintiff purchased the stock for its own use held not to present a new issue.—*Donovan-McCormick v. Sparr*, Mont., 85 Pac. Rep. 1029.

99. **MORTGAGES—Foreclosure.**—An answer to a foreclosure, setting up a partial failure of consideration, casts the burden of proof on the complainant.—*Otis v. McCaskill*, Fla., 41 So. Rep. 458.

100. **MORTGAGES—Redemption by Second Mortgagee.**—A purchase by a second mortgagee under an agreement by the first mortgagee to allow redemption after the time therefor had expired held to open the foreclosure decree and entitle the holders of the equity to redeem.—*Phelps v. Root*, Vt., 63 Atl. Rep. 941.

101. **MUNICIPAL CORPORATIONS—Defective Sidewalks.**—In an action for damages from a defective sidewalk, a demurrer should be sustained when petition fails to state that the city had notice of the alleged defect.—*City of La Harpe v. Greer*, Kan., 85 Pac. Rep. 1015.

102. **MUNICIPAL CORPORATIONS—Defective Sidewalks.**—A person traveling on a public street, while acting with

reasonable care, has a right to presume that the street is reasonably safe by night as well as by day.—*City of Stillwater v. Swisher*, Okla., 85 Pac. Rep. 1110.

103. **MUNICIPAL CORPORATIONS—New Orleans Board of Liquidation.**—Under Acts 1890, p. 144, No. 110, providing for the payment of certain funds to the board of liquidation of the city of New Orleans, or to a fiscal agent to be selected by them, members of the board, interested in a business way in a bank, are not qualified to act in selecting that bank as the board's fiscal agent.—*State v. Briede*, La., 41 So. Rep. 487.

104. **NAVIGABLE WATERS—Acts Requiring Alteration of Bridges.**—The right of the United States to require the removal or alteration of a bridge over a navigable interstate waterway as an obstruction to navigation is not affected by the fact that it made no objection when the bridge was built under state authority, when its consent was not asked.—*United States v. Union Bridge Co.*, U. S. D. C., N. D. Pa., 143 Fed. Rep. 377.

105. **NEGLIGENCE—Independent Contractor.**—Where one for a stipulated price contracts to procure timbers for a mining company, held that such contractor exercises an independent employment, and the company is not liable to one in its employ injured by the contractor in negligently prosecuting his work.—*Anderson v. Tug River Coal & Coke Co.*, W. Va., 53 S. E. Rep. 718.

106. **NUISANCE—Stairway Near Street.**—A property owner maintaining a stairway near a sidewalk held not guilty of maintaining a nuisance, and not liable to a person injured by falling down the stairs.—*Sheehan v. Bailey Bldg. Co.*, Wash., 85 Pac. Rep. 44.

107. **OFFICERS—Title to Office.**—Courts will not, in a collateral proceeding involving the title to a public office, go behind the recitals of the existence of a vacancy in such office contained in a commission issued on an appointment thereto.—*Hubbell v. Armijo*, N. M., 85 Pac. Rep. 1046.

108. **PARTITION—Issues.**—Where heirs have claims for improvements enhancing the value of the land belonging to the estate, such improvements should be appraised separately, either before or immediately after the partition sale.—*Faure v. Faure*, La., 41 So. Rep. 494.

109. **PARTNERSHIP—Rights of Co-partner.**—A partner held entitled to demand an interest in property acquired by his co-partner, using the partnership property.—*Deaner v. O'Hara*, Colo., 85 Pac. Rep. 1123.

110. **PERPETUITIES—Effect of Election to take Against Will.**—The fact that a widow elects to take against a will held not to permit the question whether the will contravenes the law against perpetuities being considered independent of its provision for her.—*People's Trust Co. v. Flynn*, 99 N. Y. Supp. 979.

111. **PERPETUITIES—Trusts.**—A trust in favor of the issue of life tenants, held to have vested immediately on the death of the life tenant.—*Denison v. Denison*, N. Y., 78 N. E. Rep. 162.

112. **PLEADINGS—Conclusions of Law.**—In an action for death of a servant, an averment as to defendant's duty to furnish a safe place for the servant to work, etc., held a mere conclusion of the legal effect of the facts pleaded.—*Long v. John Stephenson Co.*, N. J., 63 Atl. Rep. 910.

113. **PRINCIPAL AND AGENT—Dissolution of Partnership.**—Knowledge of salesman as to the assumption by one partner of a dissolved partnership's liabilities held not chargeable to the salesman's principal.—*Moon Bros. Carriage Co. v. Devenish*, Wash., 85 Pac. Rep. 17.

114. **PRINCIPAL AND SURETY—Contractor's Bond.**—Sureties in a contractor's bond held not discharged from liability because the contractor made alterations in the work without requiring the request therefor to be in writing.—*Enterprise Hotel Co. v. Book*, Oreg., 85 Pac. Rep. 333.

115. **PROPERTY—Sale Under Execution.**—Where property was sold under an execution to a purchaser other than the judgment creditor, the execution of a receipt by the latter to the sheriff for the price, without actual payment by the purchaser, held insufficient to pass title.—*Fuller v. Exchange Bank, Ind.*, 78 N. E. Rep. 706.

116. **PUBLIC LANDS—Foreible Entry and Detainer.**—Unlawful entry and detainer will not lie so long as the rights of the parties are undetermined at the time of the service of a notice to quit.—*Best v. Frazier*, Okla., 85 Pac. Rep. 1119.

117. **PUBLIC LANDS—Unlawful Inclosure.**—By unlawfully inclosing government land with his own, one acquires no right to the exclusive possession of such government lands, nor can he by the inclosure deprive others from peaceably turning cattle thereon.—*Hardman v. King*, Wyo., 85 Pac. Rep. 382.

118. **RAILROADS—Injury to Consignee of Freight.**—Plaintiff, who was injured by the negligence of defendant's trainmen while he was unloading ice, consigned to him, from the caboose of defendant's train, held not a mere licensee, but entitled to protection from the negligence of defendant's servants.—*Santa Fe, P. & P. Ry. Co. v. Ford*, Ariz., 85 Pac. Rep. 1072.

119. **RAILROADS—Instruction as to Care Required.**—In an action for injuries to a consignee of freight while unloading the same from the caboose of a freight train, an instruction as to the care required of defendant held erroneous.—*Santa Fe, P. & P. Ry. Co. v. Ford*, Ariz., 85 Pac. Rep. 1072.

120. **REFORMATION OF INSTRUMENTS—Mortgage.**—Where a mortgage recites that the debt is a note signed by the wife together with the husband, but the evidence shows a note signed by the husband alone as the debt secured, it is not error to reform the mortgage and foreclose it.—*Bastin v. Schafter*, Okla., 85 Pac. Rep. 349.

121. **RELEASE—Pleading.**—A reply to an answer in a personal injury action averring a settlement, held to sufficiently plead *non est factum* as against a demurrer.—*Indiana Union Traction Co. v. McKinney*, Ind., 78 N. E. Rep. 208.

122. **SALES—Entire Contract.**—Where two articles are sold by an entire contract, an acceptance of one of the articles is an acceptance of both.—*Buckeye Buggy Co. v. Montana Stables*, Wash., 85 Pac. Rep. 1077.

123. **SALES—Stoppage in Transitu.**—A seller on credit held entitled to resume possession of the goods while they are in the hands of the carrier or middleman in transit on the buyer becoming insolvent.—*Frame v. Oregon Liquor Co.*, Oreg., 85 Pac. Rep. 1009.

124. **SPECIFIC PERFORMANCE—Contracts Enforceable.**—The description of land in a contract for the sale thereof, held too indefinite to warrant a decree for specific performance.—*Freeburgh v. Lamoureux*, Wyo., 85 Pac. Rep. 1054.

125. **SPECIFIC PERFORMANCE—Sale of Real Estate.**—A vendee held entitled to specific performance of a contract for the sale of land by the vendor corporation.—*Davidson v. Cannabis Mfg. Co.*, 98 N. Y. Supp. 1018.

126. **STATUTES—Passage of Bills.**—The courts may look into the journals of either house to determine whether the statute was enacted in accordance with Const. Art. 5, § 25.—*Palatine Ins. Co., Limited, of Manchester, England, v. Northern Pac. Ry. Co.*, Mont., 85 Pac. Rep. 1032.

127. **STREET RAILROADS—Crossing Track.**—The driver of an ordinary vehicle may cross a street railroad in the face of an approaching car if he has reasonable ground to believe that he can pass in safety.—*Indianapolis St. Ry. Co. v. Bolin*, Ind., 78 N. E. Rep. 210.

128. **STREET RAILROADS—Injury to Passenger Boarding Car.**—Street car company held not guilty of negligence causing injuries of person who attempted to board a car.—*Woodman v. Seattle Electric Co.*, Wash., 85 Pac. Rep. 23.

129. **TAXATION—Inheritance Tax.**—A statute imposing an inheritance tax must be construed strictly against the government.—*People v. Koenig*, Colo., 85 Pac. Rep. 1129.

130. **TAXATION—Tax Deed.**—Where the only objection to a tax deed is that a statutory recital is omitted, the deed will not be declared void if from recitals contained therein it can be said that the omitted recital is fairly supplied.—*Gibson v. Trisler*, Kan., 85 Pac. Rep. 418.

131. **TAXATION—Waiver of Notice of Proceedings.**—Want of notice of a memorandum of costs filed held not waived by the debtor's submitting a motion to tax along with his motion to strike out the memorandum as a whole.—*State v. District Court of Second Judicial Dist.*, Mont., 85 Pac. Rep. 867.

132. **TELEGRAPHS AND TELEPHONES—Right to Erect Poles.**—Telegraph and telephone companies derive their right to erect their poles and string their wires along streets and highways directly from the state.—*Village of Carthage v. Central New York Telephone & Telegraph Co.*, N. Y., 78 N. E. Rep. 165.

133. **TRESPASS—Exemplary Damages.**—In an action for trespass on land held, that the jury were authorized in inferring wantonness or malice authorizing exemplary damages.—*Western Union Telegraph Co. v. Dickens*, Ala., 41 So. Rep. 469.

134. **TRIAL—Special Findings of Fact.**—Where special findings of fact are asked, such fact must be material to the controversy, and the interrogatories must ask a response as to the existence of some particular fact.—*City of Stillwater v. Swisher*, Okla., 85 Pac. Rep. 1110.

135. **TRIAL—Trespass.**—Where defendant admitted in his answer that he tore down the fence alleged to constitute the trespass relied on, but claimed that plaintiff was not the owner of the lands, defendant was not entitled to go to the jury on the question of trespass.—*Cravath v. Baylis*, 98 N. Y. Supp. 978.

136. **TRUSTS—Conveyance of Trust Property.**—A deed by a married woman and her husband conveying property which had been deeded in trust for her held a nullity.—*Cameron v. Hicks*, N. Car., 53 S. E. Rep. 728.

137. **TRUSTS—Rights of Copartner.**—The interest which a partner has in property acquired by copartner in consequence of using the partnership property held a resulting trust.—*Deaner v. O'Hara*, Colo., 85 Pac. Rep. 1123.

138. **WATERS AND WATER COURSES—Grant of Water Power.**—When the owner of a dam and water privileges grants a part of the water power, the right of the grantee is to the extent of the grant, unless the grantee has no desire to use the water.—*Oakland Woolen Co. v. Union Gas & Electric Co., Inc.*, 63 Atl. Rep. 915.

139. **WILLS—Adopted Children.**—Trustee under will held *in loco parentis* to an adopted child of one of the beneficiaries of the trust, and bound to make such provision for her maintenance as could reasonably be done with due regard to her needs and the condition of the trust estate.—*In re Olney*, R. I., 63 Atl. Rep. 956.

140. **WILLS—Interest of Public Administrator in Contest.**—The public administrator has no interest in the estate of a deceased person within Code Civ. Proc. 1895, § 2329, authorizing parties in interest to contest the probate of a will.—*State v. District Court of Second Judicial Dist.*, Mont., 85 Pac. Rep. 1022.

141. **WILLS—Probate.**—Where a petition for the revocation of the probate of a will was filed 10 months after the will was admitted to probate, leave to amend the petition 5 months after it was filed was properly denied in the discretion of the court.—*In re Sheppard's Estate*, Cal., 85 Pac. Rep. 312.

142. **WITNESSES—Cross-Examination.**—In a prosecution for homicide, a question asked of a witness as to whether he and deceased had anything to drink the day of the homicide held proper cross examination.—*State v. Trueman*, Mont., 85 Pac. Rep. 1024.

143. **WITNESSES—Cross Examination.**—A broad range of inquiry will be allowed, on cross-examination, that class of witnesses commonly called "experts."—*Trull v. Modern Woodmen of America*, Idaho, 85 Pac. Rep. 1081.

144. **WITNESSES—Privileged Communications.**—Where testimony is objected to on the ground that the witness was the attorney of the objecting party at the time the communications sought to be proven were made, the burden is on the objecting party to prove that the relation of attorney and client existed.—*Phelps v. Root*, Vt., 63 Atl. Rep. 941.